U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTONIO J. GIUNTA and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

Docket No. 00-479; Submitted on the Record;
Issued February 19, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant forfeited compensation for the period October 29, 1992 through January 28, 1994 in the amount of $43,766.65 because he knowingly failed to report his employment activities; (2) whether the Office properly determined that appellant was at fault in the creation of the overpayment; and (3) whether the Office properly required repayment by withholding the overpaid amount from the lump-sum compensation owed to appellant.

On November 11, 1967 appellant, then a 19-year-old letter carrier, sustained a back strain and spondylolisthesis at L4-S1 after jumping from a mail truck and landing on his back. Appellant stopped work on June 7, 1968 and received compensation benefits beginning June 26, 1968.

Appellant completed and signed Forms CA-1032 which advised "If you fail to answer all questions on your statement fully and accurately, your compensation benefits may be suspended."

On January 28, 1994 appellant submitted a Form CA-1032 to the Office which covered the period from October 1992 to December 1993. The form asked information about appellant's earnings/self-employment during the preceding 15 months. Appellant answered "No" to the question about whether he was employed during the time period covered by this form. He answered "No" to the question about whether he was self-employed at any time covered by this form and he answered "Yes" to the question about whether he was unemployed for all periods during the previous 15 months.

As part of a postal investigation of appellant, Dale L. Osgood, provided a statement which noted that he was employed at Camelback Liquidation from approximately August 1 to October 1, 1993 as a sales representative. Mr. Osgood indicated that the sales staff consisted of

appellant, a younger man named Mark,[1] and himself, with support staff consisting of Eric Brown, Tony Guerra, a man named Kevin and a man named Terry. Mr. Osgood stated that appellant worked 8:00 a.m. to 4:00 p.m. Monday through Saturday and no Sundays, that commissions were paid through Mr. Brown on a cash basis, that he estimated that a sales representative could average $3,000.00 per month on sales of 12 to 15 cars in 30 days. Mr. Osgood explained that "My knowledge of other employees Mark and [appellant] only covers limited area." The special agent noted in her investigation report of the interview that records of commissions paid on each car sold were maintained by Mr. Brown.

The investigation included videotape evidence of appellant reporting to Camelback Liquidation and unlocking the front and side doors, leaving there at 4:00 p.m. and having his vehicle parked there during the day. Appellant was seen talking to customers, shaking hands, getting keys to unlock doors and being a passenger in a car on a test drive. He raised and lowered a vehicle hood, walked across the lot, moved a car from one spot to another and looked under a hood. The inspector asked Mr. Brown, the manager, to name the employees of the center and he mentioned appellant, but later noted that appellant only "hangs out here. [He] buys/sells cars on his own. [Appellant] also goes to car auctions." Mr. Brown told the inspector that appellant used Camelback's seller license because he did not have one of his own.

A statement from the Social Security Administration showed no earnings reported for the period January 1992 through December 1994.

On July 25, 1997, after a three-day trial, a federal jury in the U.S. District Court for the District of Arizona convicted appellant on one count under 18 U.S.C. § 1920, making a false statement to obtain Federal Employees' Compensation Act benefits. The jury found that appellant had failed to disclose that he had worked in a compensated capacity for Camelback Liquidation Center as a car salesman on at least 12 occasions between August 28 and November 19, 1993.

By decision dated August 28, 1997, the Office terminated appellant's compensation effective July 25, 1997. The Office advised that it was prohibited from expending any money for the benefits of an individual convicted under 18 U.S.C. § 1920 or of any felony related to the application for or receipt of benefits.

By letter dated September 24, 1997, appellant requested an oral hearing.

By letter dated October 6, 1997, the Office made a preliminary determination that an overpayment of compensation was created for the period October 29, 1992 through January 28, 1994 in the amount of $43,766.65 as appellant was convicted of fraud and forfeited compensation covered by the applicable Form CA-1032. The Office found that as appellant did not report earnings on his CA-1032, he knowingly made an incorrect statement which he knew to be material and that he was convicted of fraud for these omissions. Also by decision dated October 6, 1997, the Office found that appellant forfeited his entitlement to compensation

[1] No last name was given, and it appeared to be unknown by Mr. Osgood as indicated by his dashed lines in his written statement.

benefits for the period October 29, 1992 through January 28, 1994 because he knowingly failed to report earnings as required under the Act.

On June 4, 1998 the district court sentenced appellant to a prison term of eight months, fined him $2,000.00 and ordered restitution totaling $42,792.29.[2] Appellant appealed his conviction to the United States Court of Appeals for the Ninth Circuit.

A hearing before an Office hearing representative was held on March 2, 1999 at which appellant testified. He noted that the Office terminated his compensation effective July 25, 1997 under 5 U.S.C. § 8148 due to a conviction for fraud.

At the oral hearing, appellant stated that he started spending time at a friend's auto liquidation center in August 1993, that he would go to the auto center to talk to his friend and chat, and that he bought a car for his wife. He stated that he knew what a car salesman did because he used to be one, and that a salesman took a client for a demo ride, took a deposit, took financial statements, filled out financial papers, filled out a bill of sale, and got plates, registration and title. Appellant stated that he never performed any of these activities, except for occasionally taking a customer out on a test drive when no salesman was around. He testified that due to insomnia he was frequently up at three or four in the morning and that therefore he would open the center in the morning. Appellant would open the front door, turn off the alarm, sit down, have coffee and breakfast, and then read the paper until, the manager arrived. The manager would unlock the rest of the doors. Appellant testified that then he would go to his cubicle and fall asleep. He stated that if a customer came in and no one else was around, he would get the keys for the customer or engage him in conversation until someone else showed up. Appellant testified that "the only time that there was any money exchanged in whatever shape or form was while I was on that test drive in my condition, I did not want to push a vehicle, they never leave gas in these vehicles ... [s]o I would tell the customer, please lets go to the nearest gas station and I would take $2.00 out of my wallet, get the gas, get a receipt and then we would continue to test drive. You bring it back and at the end of the week, I would hand in all my receipts, which might have totaled five or six dollars and give it to Eric and he would give me back the money [f]or the gas and that was it."

Appellant testified that he was not self-employed, that he was not paid anything, and that he never received a fee or shared a fee for selling a car. He testified that he never received any money and that he did work as a car salesman. Appellant reiterated that he was at the business because he had nothing else to do and he spent time socializing with friends.

The record reveals that the Ninth Circuit Court of Appeals heard argument on April 13, 1999 and found on May 7, 1999 that appellant's criminal indictment was insufficient to sustain the conviction. The court reversed appellant's conviction and remanded the case with leave to proceed under the correct statute.

Following the Ninth Circuit decision appellant contended that since the indictment was insufficient to sustain a conviction and the conviction was reversed, the Office's termination of his compensation was improper.

[2] There was no evidence of record which supported that appellant served anytime in incarceration.

By decision dated June 16, 1999, the hearing representative noted that appellant's termination of compensation effective July 25, 1997 was reversed, that under 5 U.S.C. § 8106 appellant was guilty of knowingly failing to report his earnings from employment during a period of receipt of compensation, and therefore that he was at fault in the creation of the overpayment. The hearing representative found that appellant had been sentenced to eight months incarceration was not therefore entitled to compensation for that period. He found that depending on the period of incarceration, retroactive compensation should exceed the $43,766.65 overpayment, such that the overpayment should be recovered from the benefits due appellant retroactive to July 25, 1997. The hearing representative reversed the August 28, 1997 termination decision but affirmed the October 6, 1997 forfeiture decision, and finalized the preliminary determination that appellant was at fault in the creation of an overpayment. He directed that the overpayment be recovered from benefits due appellant retroactive to July 25, 1997.

The Board finds that the Office improperly determined that appellant forfeited his right to compensation for the period October 29, 1992 through January 28, 1994.

To determine whether an overpayment of compensation occurred in this case, the Board must initially determine whether appellant forfeited his right to monetary compensation from October 29, 1992 through January 28, 1994 pursuant to 5 U.S.C. § 8106(b).[3]

Section 8106(b) of the Federal Employees' Compensation Act provides in pertinent part:

> "The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. The employee shall include in the affidavit or report the value of housing, board, lodging, and other advantages which are part of his earnings in employment or self-employment and which can be estimated in money. An employee who --
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> > (1) fails to make an affidavit or report when required; or (2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required."[4]

Office regulations define "earnings from employment or self-employment" as:

> "(1) Gross earnings or wages before any deductions and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or
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> "(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the

[3] *See Samuel J. Rosso*, 28 ECAB 43 (1976).

[4] 5 U.S.C. § 8106(b).

> characterization of the duties as a hobby, removes an unremunerated individual's responsibility to report the estimated cost to have someone else perform his or her duties."[5]

In analyzing whether an employee in receipt of compensation has earnings or wages the Board, in *Christine P. Burgess*[6] noted wages are defined as:

> "Every form of remuneration payable for a given period to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses and reasonable value of board, rent, housing, lodging, payments in kind, tips and any other similar advantages received from the individual's employer or directly with respect to work for him."[7]

In *Burgess*, the employee received reimbursed expenses and "other advantages" as part of wages or remuneration in the form of free travel, lodging, food and transportation costs as a result of performing the duties of an escort for a travel service. Based on these reimbursed and payments in kind, the Board found that appellant had "earnings" as defined under section 8106(c) which she was required to report to the Office. Similarly in *Barbara L. Kanter*,[8] the employee received monetary remuneration from the sales of dogs from her self-employment as a dog breeder. The Board noted that appellant's self-employment activities were not so *de minimus* that her earnings did not have to be reported to the Office as required under the Act. In *James M. Steck*,[9] the employee had earnings from his self-employment as a youth minister in that he received free housing, living expenses and utilities as remuneration for his work.

In the present case, the Office found appellant forfeited his right to compensation for the period October 29, 1992 through January 28, 1994 on the basis that he knowlingly failed to report earnings on Office Form CA-1032. However, the Board finds that the Office has not established, as required by section 8106(b), that appellant had "earnings" or other forms of remuneration from his activities at the car liquidation center. The evidence of record does not establish that appellant received any wages, tips or other similar advantages from the car liquidation center with respect to his activities, *i.e.*, in the form of any discount or merchandise or other benefit conveyed.[10] Appellant's failure to show as "rate of pay" what it would have cost the employer to hire someone to perform the work he performed may make him liable to prosecution or lead to a reduction in his monetary benefits to reflect a wage-earning capacity.

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[5] 20 C.F.R. § 10.5(g).

[6] 43 ECAB 449 (1992).

[7] *Id.* at 457, citing *Black's Law Dictionary*, Fifth Edition (1979).

[8] 46 ECAB 165 (1994).

[9] 49 ECAB 134 (1997).

[10] *Compare Cecil S. Ortagus*, 38 ECAB 141 (1986) (setting aside a period of forfeiture as there was no evidence that there were earnings); *Jack Langley*, 34 ECAB 1077 (1983) (noting the Office's application of the forfeiture provision of the Act is not proper where an employee has no outside earnings).

In *Daniel A. Mashe*,[11] the Board found that the Office did not establish that the employee had any earnings or other forms of remuneration from his activities at a liquor store. The employee received no wages, tips of other similar advantages such as discounts on merchandise or receipt of commodities in exchange for his services. Further he had no personal financial interest in the business, such as would occur with a family-owned or associate-owned business. As no benefit inured to the employee from his activities at the store, the Board found that he had no earnings under 5 U.S.C. § 8106(b) and the forfeiture finding by the Office was improper.

The Board notes that the only evidence that appellant had earnings, from his activities at the car liquidation center is a co-employee's statement made to a postal inspector. Mr. Osgood stated that he was a short time employee and his knowledge about appellant only covered a limited area. Mr. Osgood did not witness or have direct knowledge of appellant receiving any payment in any amount. He noted that appellant was a salesman and mentioned that a good salesman could average $3,000.00 per month. This evidence is not sufficient to establish that appellant received a salary, had any other earnings from commissions or other similar advantages granted in exchange for his services. Both the center's owner and general manager denied that appellant worked as an employee or that they paid him anything. The Office has not submitted any payment records demonstrating hours worked or that any payments were made to appellant. No further evidence that appellant had any earnings was produced. In *Louis P. McKenna, Jr.*,[12] the Board noted that the Office may not base its application of the forfeiture provision strictly on conclusions drawn in an investigative report, but rather the evidence of record must establish that the claimant has unreported earnings from employment which were knowingly not reported. As there is no evidence which establishes that appellant had earnings from the liquidation center, the Office has not met its burden of proof to establish that appellant had unreported earnings.

With no evidence of the receipt of earnings or other remuneration from his time spent at the Camelback Liquidation Center, the record provides no basis for invoking the penalty provision of section 8106(b)(2). This case is distinguishable from those instances where forfeiture has been invoked based on a claimant's self-employment in a family-owned business or where a personal financial interest is otherwise established as accruing to the benefit of the employee, members of his or her family, or other associates.[13] The record does not demonstrate any financial interest by appellant in the auto center or that any benefit inured to him based on his activities

On appeal appellant contends that the holding in the *Dorey* case[14] applies in this situation, finding that the Secretary of Labor is not authorized to require a totally disabled person to report his earnings from employment or self-employment, and that therefore a totally disabled claimant should not be prosecuted on the basis of any statement contained in an employment report.

[11] Docket No. 97-2115 (issued June 11, 1999).

[12] 46 ECAB 328 (1994).

[13] *Compare Robert C. Gilliam*, 50 ECAB 334 (1999) (employee owned and operated motor home rental companies); *Gary L. Allen*, 47 ECAB 409 (1996) (employee had earnings from lawn mowing service); *Anthony Nobile*, 44 ECAB 268 (1992) (employee operated a family owned liquor store).

[14] *U.S. v Dorey*, 711 F.2rd 125 (9th Cir. 1983).

The Board, however, is not persuaded. In *James D. O'Neal*,[15] and in *Sherwood T. Rodrigues*,[16] the Board stated:

> "The Appeals Court pointed out that the Due Process Clause requires fair warning of conduct which is considered criminal and would subject an individual to such prosecution. Although the Appeals Court found that 5 U.S.C. § 8106 and 18 U.S.C. § 1001, when read together, do not provide adequate warning to individuals declared temporarily totally disabled that they must truthfully report their employment and earnings, the Appeals Court specifically limited their finding to cases where the appellant is indicted on criminal charges based on sections 8106 and 1001 of their respective Titles. The Appeals Court excluded application of its interpretation in purely administrative noncriminal adjudication. Further, the Court neither found fault with the administrative determination that total disability can be construed as partial disability in certain administrative contexts nor did it specifically address those situations where such construction is appropriate or inappropriate in cases under the Act before the Department of Labor. Therefore, the Board concludes that the *Dorey* case is not dispositive on the issue in this administrative proceeding presently before the Board.
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> "The Board has provided reasoning for its construction of sections 8106 and 8105. If an employee is in fact totally disabled, normally he would not have any employment earnings to report and a provision regarding such earnings would be meaningless. The provision regarding reporting and forfeiture has relevance only with respect to periods of partial disability where an employee receiving compensation might also have employment earnings. Therefore, the test is whether, for the time period under consideration, the employee was, in fact, totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity."

It is not, therefore, conclusive under the circumstances of the case that the Office did not make a formal decision changing appellant's compensation status from one of total disability to that of partial disability. Appellant was, for all intents and purposes, partially disabled for the period in which he spent time at the car liquidation center, as evidenced by his ability to be present and to perform limited activities. He therefore must complete a CA-1032 report under the statute.

As the record on appeal fails to establish that appellant had any earnings from his employment activities at the car center which he was required to report, the Board finds that the Office did not properly invoke the penalty provision under section 8106(b)(2). For this reason the overpayment in this case will be set aside.

Due to this finding, the other issues are moot.

[15] 48 ECAB 255 (1996).

[16] 37 ECAB 617 (1986).

The June 16, 1999 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, DC
February 19, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member